Supreme Court, U.S.
FILED

(1)

CASE NUMBER: 95-327 JUL 11 1995

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

SILVER ROSE ENTERTAINMENT, INC., A FLORIDA CORPORATION; **SUNSHINE FOOD MART**, A FLORIDA PROPRIETORSHIP; **DALE'S PACKAGE STORE AND LOUNGE INC.**, A FLORIDA CORPORATION; **KELLY NAIL, INC.**, A FLORIDA CORPORATION; **WARD CASTENADA, INC.**, A FLORIDA CORPORATION; **HARRY'S OF ORANGE PARK, INC.**, A FLORIDA CORPORATION; **VARSITY CLUB, INC.**, A FLORIDA CORPORATION; **FLYNN RESTAURANTS, LTD.**, AN IOWA CORPORATION, **57 HEAVEN**, A CORPORATION; AND **PRINTER ENTERPRISES, INC.**, A FLORIDA CORPORATION,

PETITIONERS,

V.

CLAY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND **SCOTT LANCASTER**, AS SHERIFF OF CLAY COUNTY,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI FROM
THE FLORIDA FIRST DISTRICT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. HALEY
Counsel of Record
BRANNON, BROWN, HALEY, ROBINSON
& BULLOCK, P.A.
10 North Columbia Street
P.O. Box 1029
Lake City, FL 32056
(904) 752-3213

Attorneys for Petitioner

67 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c), PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, FAILS THE LEMON TEST, THEREBY VIOLATING THE ESTABLISHMENT CLAUSE CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c), PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, VIOLATES THE EQUAL PROTECTION CLAUSE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

LISTING OF PARTIES

Petitioners:

(1) SILVER ROSE ENTERTAINMENT, INC.
(2) SUNSHINE FOOD MART
(3) DALE'S PACKAGE STORE AND LOUNGE INC.
(4) KELLY NAIL, INC.
(5) WARD CASTENADA, INC.
(6) HARRY'S OF ORANGE PARK, INC.
(7) VARSITY CLUB, INC.
(8) FLYNN RESTAURANTS, LTD.
(9) 57 HEAVEN
(10) PRINTER ENTERPRISES, INC.

Respondents:

(1) CLAY COUNTY, FLORIDA

(2) SCOTT LANCASTER

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LISTING OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE WRIT 12

APPENDIX 23

(a) Order entered by the Circuit Court, Fourth Judicial Circuit, in and for Clay County, Florida denying Petitioners' Motion for Temporary Injunction 1

(b) Decision of the Florida First District Court of Appeal 12

(c) Denial of the Petition for Review entered by the Florida Supreme Court 38

TABLE OF AUTHORITIES

CASES:

Cammack v. Waihee,
932 F.2d 765 (9th Cir. 1991) 17

Committee for Public Education v. Nyquist,
413 U.S. 756, 772-73, 93 S.Ct. 2955,
2965-66, 37 L.Ed.2d 948 (1973) 12

Griswold v. State,
183 Conn. 552, 441 A.2d 16 (1981).. 4,13

Moore v. Thompson,
126 So. 2d 543 (Fla. 1961)..... 18,19,21

Silver Rose Entertainment, Inc. v. Clay County,
No. 93-4154, slip op. at 11..... 20

Stone v. Graham,
449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d
199 (1980) 13,16

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I 5

U.S. Const. amend. XIV 5

RULES:

Clay County, Fla., Code § 3-2(c)..... 6,8

Sup. Ct. R. 10 3,7

STATUTES:

28 U.S.C.A § 1257 3,6

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

Silver Rose Entertainment, Inc., a Florida Corporation; Sunshine Food Mart, a Florida Proprietorship; Dale's Package Store and Lounge Inc., a Florida Corporation; Kelly Nail, Inc., a Florida Corporation; Ward Castenada, Inc., a Florida Corporation; Harry's of Orange Park, Inc., a Florida Corporation; Varsity Club, Inc., a Florida Corporation; Flynn Restaurants, Ltd., an Iowa Corporation, 57 Heaven, a Corporation; and Printer Enterprises, Inc., a Florida Corporation, Petitioners

V.

Clay County, a Political Subdivision of the State of Florida, and Scott Lancaster, as Sheriff of Clay County, Respondents

PETITION FOR WRIT OF CERTIORARI
to the Florida First District
Court of Appeal

The petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Florida First District Court of Appeal entered on November 22, 1994, which upheld the judgment granted in favor of the Respondents on December 22,

1993.

OPINIONS BELOW

The Order of the Circuit Court, Fourth Judicial Circuit, in and for Clay County, Florida, denying Petitioners' Motion for Temporary Injunction entered on December 22, 1993 is located on page 1 of the appendix. The Opinion of the Florida First District Court of Appeal entered November 22, 1994 affirming the circuit court's ruling is located on page 12 of the appendix. The Denial of the Petition for Review entered by the Florida Supreme Court dated April 12,. 1995, is located on page 38 of the appendix.

JURISDICTION

The opinion of the Florida First District Court of Appeal was entered November 22, 1994. Petitioners'' Petition for Review, which was timely filed with the Florida Supreme Court, was denied on April 12, 1995. The Court has jurisdiction over this case

pursuant to Title 28 § 1257 of the United States Code which provides, in part, that the Supreme Court of the United States may review final judgments or decrees rendered by the highest court of a State in which a decision could be had, where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution. 28 U.S.C.A. § 1257. Also, this Court may invoke jurisdiction as provided by Rule 10(.1)(b) of the Rules of the Supreme Court of the United States. The Rule provides that inconsistent rulings concerning a federal question between two state courts of last resort is a reason that will be considered in deciding on a petition for writ of certiorari review. Sup. Ct. R. 10.

The judgment sought to be reviewed was entered by the Circuit Court of the Fourth Judicial Circuit, in and for Clay County, Florida, and affirmed by the First District

Court of Appeal of the State of Florida on November 22, 1994. The Supreme Court of Florida declined to accept jurisdiction and denied the Petition for Review on April 12, 1995. The Florida First District Court of Appeal (i.e. the highest appellate court in Florida that rendered a written opinion) held that a Clay County, Florida ordinance prohibiting the sale of alcoholic beverages on Christmas Day passed the Lemon test and, therefore, was not in violation of the Establishment Clause contained in the First Amendment to the United States Constitution. In a conflicting opinion, the Supreme Court of Connecticut, in Griswold v. State, held that a similar statute prohibiting the sale of alcohol on Good Friday violated the three prong Lemon test and was, therefore, unconstitutional because it violated the Establishment Clause of the Constitution. Griswold v. State, 183 Conn. 552, 441 A.2d 16 (1981).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

United States Constitution, Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CLAY COUNTY, FLORIDA, CODE § 3-2(c)

An exception to the above stated hours of sale shall be that no alcoholic beverages shall be sold on Christmas Day until the regular authorized opening sale time on December twenty-sixth. The intention of this subsection is that no alcoholic beverages be sold during Christmas Day and Christmas night of each year. Clay County, Fla., Code § 3-2(c).

TITLE 28 § 1257 UNITED STATES CODE

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any

title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. 28 U.S.C.A. § 1257.

RULES OF THE SUPREME COURT, RULE 10

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered: (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10.

STATEMENT OF THE CASE

This case involves the issue of whether a county's power to regulate is so broad that it can enact ordinances that prohibit a single business class from selling its products on Christmas Day without the ordinance being subjected to meaningful court scrutiny.

In the State trial court, Petitioners challenged the constitutional validity of an ordinance enacted by Clay County, Florida, which provides:

> (c) An exception to the above stated hours of sale shall be that no alcoholic beverages shall be sold on Christmas Day until the regular authorized opening sale time on December twenty-sixth. The intention of this subsection is that no alcoholic beverages be sold during Christmas Day and Christmas night of each year.

Clay County, Fla., Code Section 3-2(c). Petitioners' suit asserted that counties only have the power to regulate, not prohibit, the sale of alcohol. Further, even if counties possess the power to prohibit the sale of

alcohol, the ordinance at issue violated constitutional principles by singling out a specific class without a valid and substantial reason for making the law operate only against that class. Finally, Petitioners asserted that the ordinance violated constitutional principles by effectively endorsing the establishment of a sectarian religious practice.

Originally, the suit on appeal only addressed the issue of whether the trial court erred in denying the Petitioners' motion for a temporary injunction. However, during oral argument, both parties agreed to have the Florida First District Court of Appeal address the substance of the Petitioners' claims.

The District Court of Appeal addressed the substance of the Petitioners' claims and upheld the validity of the ordinance. However, the District Court did not apply the correct constitutional standards set by this

court. The District Court stated that counties had the power to regulate, and as a result, counties could enact ordinances prohibiting the sale of alcohol on Christmas Day. However, the District Court failed to recognize the Florida Supreme Court's precedent holdings that distinguish the power to regulate from the power to prohibit. Further, the District Court failed to address the apparent conflict created by its decision with Article VIII, Section 5, Florida Constitution.

The District Court also addressed the Petitioners' claims that the ordinance violated the Establishment Clause of the United States Constitution, as well as the Florida Constitution. The District Court recognized that the Lemon test, mandated by the United States Supreme Court, should be applied to determine whether the Clay County Ordinance violates the Establishment Clause. However, the District Court misapplied the

BEST AVAILABLE COPY

Lemon test to uphold the ordinance providing for criminal punishment of persons whose religious beliefs do not compel them to abstain from selling alcohol on Christmas (see appendix for the decisions of the Circuit Court, District Court of Appeal, and Florida Supreme Court).

The Supreme Court of Florida declined to accept jurisdiction and denied the Petition for Review on April 12, 1995.

REASONS FOR GRANTING THE WRIT

I. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c),PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, FAILS THE LEMON TEST, THEREBY VIOLATING THE ESTABLISHMENT CLAUSE CONTAINED IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

The United State Supreme Court established a three prong test, commonly called the Lemon test, to determine whether a law violates the Establishment Clause. "[T]o pass muster under the Establishment Clause, the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive governmental entanglement with religion." Committee for Public Education v. Nyquist, 413 U.S. 756, 772-73, 93 S.ct. 2955, 2965-66, 37 L.Ed.2d 948 (1973). If the law in question fails any part of the test, it is unconstitutional.

Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). As recognized by the District Court, Article I, Section 3, Florida Constitution, adds the additional requirement that no public moneys may be authorized to aid any sectarian institution.

The District Court recognized the Lemon test as the proper Establishment Clause test. However, its application of the test led it to uphold the Clay County Ordinance, which has the purpose and effect of endorsing sectarian Christian practices and which entangles government in the process of monitoring and punishing the prohibited activity. The District Court should have followed the reasoning of the Connecticut Supreme Court, which held a similar statute unconstitutional because it prohibited the sale of alcohol on "Good Friday", as opposed to the Clay County Ordinance's "Christmas Day". Griswold v. State, 183 Conn. 552, 441 A.2d 16 (1981). The line of reasoning used

by the Connecticut Supreme Court in striking down the ordinance prohibiting the sale of alcohol on Good Friday, applies equally well to Christmas. "Christmas", like "Good Friday", celebrates a significant event for the Christian religion. As noted by the District Court, the abstention from alcohol is an important practice on these days for certain Christian denominations.

In Griswold, like the present case, the government claimed that secular interests motivated the ban on alcohol sales. However, the Connecticut Supreme Court recognized the religious historical background of the legislation and found that if the legislation had secular purposes, alcohol sales would have been banned on other days as well.

The District Court acknowledged the validity of the Griswold Court's reasoning. However, in its attempt to reconcile the Griswold holding, the District Court attempted to distinguish "Christmas Day" from

"Good Friday" because Christmas has more secular traditions than the Easter holiday.[1] The District Court's distinction is without merit because it was reviewing an ordinance enforcing a religious tradition, not a secular one.

This Court should take jurisdiction because the Clay County Ordinance does not simply set out Christmas Day as a holiday, it invokes the power of the government to conform the behavior of citizens to the religious practices of a sectarian group. If the ordinance did not exist, the sectarian group could still refrain from purchasing alcohol. It must exist then to conform the behavior of those who would otherwise purchase and sell alcohol on Christmas Day.

---

1. To call the Christmas holiday season more secular than the Easter holidays is forgetting the "Easter Bunny", "Chocolate Bunnies", and Easter Egg hunts.

By enacting and enforcing the ordinance, Clay County has simply used the power of the government and threat of criminal prosecution against those citizens who do not conform their behavior regarding the sale of alcohol on a religious day. The intent of the ordinance is clearly to support sectarian religious groups endorsing Christian beliefs.

In construing the First and Fourteenth Amendments to the United States Constitution, the District Court did not require the ordinance to pass each element of the Lemon test as required by the United States Supreme Court. Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). Nor did the District Court uphold the requirement of Article I, Section 3, Florida Constitution, that no public moneys be used in the aid of any sectarian institution. Thus, this Court should grant jurisdiction and overturn the Clay County Ordinance because it violates the Establishment Clause of the United States

Constitution.

The only Federal decision clearly addressing the Griswold decision is found in footnote eighteen in Cammack v. Waihee, 932 F.2d 765, 781 (9th Cir. 1991), wherein the court was asked to construe Hawaii's declared state holiday on "Good Friday" as violating the Establishment Clause. In determining that it did not, the Ninth Circuit pointed out that in Griswold, there was government entanglement under the Lemon test because the State was forced to monitor alcohol sales on Good Friday and, in effect, "enforce observance of a religious holiday" by liquor licenses. This holding by the Ninth Circuit should be applied sub judice because the Clay County Ordinance is attempting to accomplish the same governmental endorsement of religion, however, on Christmas Day instead of Easter.

II. WHETHER CLAY COUNTY, FLORIDA ORDINANCE, SECTION 3-2(c), PROHIBITING THE SALE OF ALCOHOLIC BEVERAGES ON "CHRISTMAS DAY", WITH THE STATED INTENTION, CONTAINED IN

THE ORDINANCE, THAT NO ALCOHOLIC BEVERAGES SHALL BE SOLD DURING CHRISTMAS DAY AND CHRISTMAS NIGHT OF EACH YEAR, VIOLATES THE EQUAL PROTECTION CLAUSE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

This Court should grant jurisdiction to reaffirm the proper constitutional scrutiny to which prohibitive legislation must be subjected, as enumerated by the Florida Supreme Court in Moore v. Thompson. Moore v. Thompson, 126 So. 2d 543 (Fla. 1961). In Moore, an automobile dealer challenged the constitutional validity of Chapter 59-295, Laws of Florida, which provided in part:

> Section 1. It shall be unlawful for any person, firm or corporation licensed under Section 320.27, Florida Statutes, to engage in the business of buying, selling, trading or exchanging new, used or second-hand motor vehicles, or to offer to buy, sell, trade or exchange new, used or second-hand motor vehicle or interest therein or any written instrument pertaining thereto, on the first day of the week, commonly called Sunday, or on legal holidays, commonly called New Year's Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas.

Moore, 126 So. 2d at 547. The circuit court issued a final decree finding the statute

constitutionally valid as an appropriate exercise of the legislative police power. Moore, 126 So. 2d at 544. On direct appeal, the Florida Supreme Court reversed the circuit court and held that the statute unconstitutionally prohibited a class of business from selling its products on Sundays and holidays, including Christmas, without showing that such a prohibition was necessary to protect the public welfare. Moore, 126 So. 2d at 552.

In Moore, the Florida Supreme Court acknowledged the state's power to regulate car dealers. However, the Florida Supreme Court applied the Equal Protection Clause contained in the Fourteenth Amendment and held the power to regulate does not encompass the power to prohibit a business from selling goods on a designated day. Moore, 126 So. 2d at 550. The Moore Court held that the proper Constitutional standard, contained in the Equal Protection Clause, to be applied to

laws that prohibit business transactions on a designated day is, "that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all." Moore, 126 So. 2d at 543. The Florida Supreme Court applied the "valid and substantial reason" scrutiny to the statute and held that sufficient justification did not exist to single out the automobile business for prohibitive treatment.

In the present case, the First District Court of Appeal reached the opposite result from the Moore decision by upholding the ordinance and refusing to apply the constitutional standards and reasoning established by this Court. Silver Rose Entertainment, Inc. v. Clay County, No. 93-4154, slip op. at 11. The District Court relied solely on the county's power to regulate to uphold the prohibitive ordinance. The District Court found the general power to

regulate made further scrutiny of the ordinance unnecessary. However, the District Court's analysis indicates that it failed to recognize the key distinction between the cases it relied upon and the Florida Supreme Court's decision in Moore.

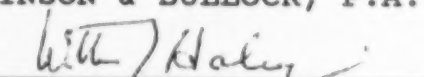
In Moore, as in the instant case, the Clay County Ordinance prohibits a class of commercial transactions on a designated day and renders certain businesses not equal to others. In the cases cited by the District Court, the statutes or ordinances merely regulated the business "in the premises." Moore, 126 So. 2d at 551. As the Florida Supreme Court made clear in Moore, "the power to regulate does not encompass the power to prohibit." Moore, 126 So. 2d at 550. Thus, this Court should grant jurisdiction and overturn the Clay County Ordinance because it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by

prohibiting the sale of alcohol on a religious holiday while not prohibiting the sale of other products on the same day.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to **Mark H. Scruby, Esquire**, Post Office Box 1366, Green Cove Springs, FL 32043, and **John Kopelousos, Esquire**, Post Office Box 562, Orange Park, FL 32067-0562 by U.S. Mail on this 21st day of August, 1995.

BRANNON, BROWN, HALEY,
ROBINSON & BULLOCK, P.A.



WILLIAM J. HALEY
Counsel of Record
Florida Bar No. 32870
10 North Columbia Street
P.O. Box 1029
Lake City, FL 32056
(904) 752-3213

Attorneys for Petitioner

APPENDIX

IN THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
IN AND FOR CLAY COUNTY,
FLORIDA

CASE NO: 93-2425 CA

DIVISION: A

Silver Rose Entertainment, Inc., a Florida Corporation; Sunshine Food Mart, a Florida Proprietorship; Dale's Package Store and Lounge Inc., a Florida Corporation; Kelly Nail, Inc., a Florida Corporation; Ward Castenada, Inc., a Florida Corporation; Harry's of Orange Park, Inc., a Florida Corporation; Varsity Club, Inc., a Florida Corporation; Flynn Restaurants, Ltd., an Iowa Corporation, 57 Heaven, a Corporation; and Printer Enterprises, Inc., a Florida Corporation,

Plaintiffs,

V.

Clay County, a Political Subdivision of the State of Florida, and Scott Lancaster, as Sheriff of Clay County,

Defendants.
_____/

ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

THIS CAUSE came to be heard on the Plaintiffs' Verified Motion for Temporary Injunction filed in the above-styled cause. The cause was filed in this Court on Friday, December 17, 1993, and the hearing on the motion was held at 4:15 P.M., on the

following Tuesday, December 21, 1993. At the hearing all parties appeared through their respective counsel and were heard. In short, the Plaintiffs seek to have the Defendant Clay County and the Sheriff enjoined from enforcing Section 3-2, Clay County Code, which prohibits the sale of alcoholic beverages on Christmas Day.

Based upon the evidence and arguments presented at said hearing the Court makes the following findings of fact and conclusions of law:

1. The Plaintiffs advanced two separate arguments in support of this motion, one based on the assertion that Section 562.14, Florida Statutes, only authorizes the County to regulate the hours of sale, but not to prohibit sales on a particular day; and the other based on the contention that prohibiting sales on Christmas Day violates the establishment Clause of the First Amendment to the Constitution of the United States, made applicable to Clay County

through the Fourteenth Amendment, and Article 1, Section 3 of the Constitution of the State of Florida.

2. In presenting a petition for a temporary injunction, the Plaintiffs carry a heavy burden: to establish that their entitlement is clear, reasonably free from doubt, and necessary to prevent great and irreparable injury. They must both plead and prove their entitlement. Such relief should only be granted sparingly and cautiously.

3. Regarding the first argument, concerning Section 562.14, Florida Statutes, the Court finds first that it was neither alleged in the Complaint nor advanced in the Verified Petition; as such it was not properly before the Court for consideration, nor were the Defendants given any notice (such as it was) that such position would be asserted. The Court finds second that the Statute on its face does not appear to forbid the County from prohibiting the sale of alcohol on a particular day. This appears to

be consistent with the case submitted by the Plaintiffs: Hardage v. City of Jacksonville Beach, 399 So. 2d 1077 (Fla. 1st DCA 1981). There, the First District Court of Appeal expressly upheld the validity of the total ban on sales of alcohol on Sunday with the exception of certain establishments, with respect to an ordinance adopted under the authority of a statute which only referred to regulating location, hours and sanitary conditions of establishments serving alcohol. The Court finds third that the Defendant County's ordinance does, in fact, prohibit hours of sale which, in the case of Christmas Day, includes the entire twenty-four hour period.

4. Regarding the Plaintiffs' second argument, concerning the constitutionality of the Christmas Day sales ban, the Court finds that the Plaintiffs have failed to carry their burden. With respect to the Establishment Clause of the First Amendment, the Plaintiffs assert that the County's

ordinance has an unconstitutional purpose, effect and, from an enforcement standpoint, entanglement. Counsel for the Plaintiffs and the Defendant, Clay County, agreed that no Establishment Clause case in any jurisdiction pertaining to an alcohol sales ban on Christmas Day was discovered by either. The Plaintiffs, however, assert that the decision of the Connecticut Supreme Court in Griswold Inn, Inc. v. State of Connecticut, 441 A.2d 16 (Conn. 1981), is controlling. There, a statute had prohibited the sale of alcohol on Good Friday. In striking down the statute as violative of the Establishment Clause, the court referred to the three prong test first enunciated by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), as conformed in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). That test prohibits a regulation which either (1) has as its purpose the advancement of a sectarian worship objective; (2) has as its primary effect the advancement of a sectarian worship

objective; or (3) leads to excessive entanglement between valid state objectives (i.e., enforcement) and sectarian, religious matters. The Court is unable to conclude that Griswold is a sufficiently comparable case to clearly entitle the Plaintiffs to relief, or to demonstrate the likelihood that they will ultimately prevail on the merits. To the contrary, there is substantial reason and case law to consider Christmas Day today as largely a secular holiday (with undeniably religious origins), but to consider Good Friday as primarily if not entirely sectarian in nature with no secular tradition. See, Lynch v. Donnelly, 465 U.S. 668 (1984), wherein the United State Supreme Court took great pains to demonstrate that Christmas in our society has taken on a largely secular tradition in concluding that a certain city's creche display was not unconstitutional. See also, Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991); pet. for rehearing and for rehearing en banc denied, 944 F.2d 466 (9th

Cir. 1991), wherein the Ninth Circuit Court of Appeals upheld a Hawaiian statute declaring Good Friday to be a legal paid holiday for state employees, but lengthy dissents all took pains to distinguish Good Friday as a day of purely sectarian significance to certain religions with no secular tradition, specifically as opposed to such days as Christmas, with strong and long-time secular holiday observance traditions.

5. Based strictly upon the matters presented at the hearing, and the burden held by the Plaintiffs, and without reaching to the ultimate merits of the Complaint, the Court is unable to conclude that the Plaintiffs have clearly established unconstitutional entanglement. With Christmas Day being recognized by the United States Supreme Court as primarily a secular holiday, the Court takes note that the same Court has upheld certain Sunday blue sky laws or closing day laws in McGowan v. Maryland, 366 U.S. 420 (1961), against Establishment

Clause challenge after concluding that Sunday, is a day of rest beyond its religious origins as the Sabbath. The Court concluded that the state had an interest in establishing such a day of rest to advance the health, safety and welfare of the public. In the instant matter, this Court for purposes of temporary injunction, finds that the Plaintiffs have failed to clearly establish that the alcohol sales ban on Christmas Day has no secular purpose, a day already determined to have a strong and long secular tradition. To the contrary, the Defendant Clay County offered evidence suggesting that Christmas is a particularly deadly time of year from the standpoint of traffic safety in the State of Florida, with a high incidence of highway fatalities related to alcohol abuse. The Court is not at this time persuaded that the Defendant Clay County clearly cannot prohibit alcohol sales at such a deadly time, when the highways are usually crowded with travellers

perhaps hastening to visit family, friends, and relatives, to meet in fellowship, express good will and exchange gifts as is the holiday tradition; or perhaps even to worship. Moreover, this Court is not unmindful of the large number of domestic violence cases which enter the criminal justice system, and the fact that alcohol abuse is too often an accelerant to such violence. As counsel for the Defendant, Clay County, suggested, Christmas Day is often a day when families come together by tradition, although such coming together may not always be amicable.

6. The Court is not persuaded that for purposes of a temporary injunction the Plaintiffs have clearly established unlawful entanglement. Suffice it to say that if Sunday blue laws are enforceable under McGowan because of Sunday's secular tradition, then it would seem that an alcohol sales ban on Christmas Day with its secular tradition, is at least equally and easily

enforceable.

7. Finally, the Court is not persuaded, again merely for the purposes of a temporary injunction, that the Plaintiffs have clearly established irreparable injury. The ordinance has been in effect for 14 years without apparent challenge. The Plaintiffs and others similarly situated have not chosen to challenge the same all these years (although Christmas Day surely fell on Saturday in other years during that span). Rather, the Plaintiffs have chosen to seek an injunction on the very eve of Christmas in 1993. With respect to a holiday that has been observed from time immemorial by both public and private sector employees, this Court is not persuaded that the Plaintiffs have carried their heavy burden to grant a temporary injunction. With respect to the Plaintiffs' assertion that the Florida Constitution is even more restrictive than the Federal, this Court is not persuaded at this time that a separate establishment

clause jurisprudence exists, notwithstanding Moore v. Thompson, 126 So. 2d 543 (Fla. 1961) (wherein the Florida Supreme Court struck down a Sunday prohibition of motor vehicle sales, finding that the reasons advanced were inadequate to invoke the police powers of the State to so regulate).

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED

That the Plaintiffs' Petition for Temporary Injunction be, and hereby is denied. This Order should not be read as a final adjudication on the merits of the Complaint filed herein, but is merely limited to the narrow question of whether the Plaintiffs have carried their heavy burden to show entitlement to a temporary injunction.

DONE AND ORDERED, in Chambers, Green Cove Springs, Florida, this 22 day of December, 1993.

/s/
William A. Wilkes
Circuit Judge

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED.

CASE NO. 93-4154

Silver Rose Entertainment, Inc., a Florida Corporation; Sunshine Food Mart, a Florida Proprietorship; Dale's Package Store and Lounge Inc., a Florida Corporation; Kelly Nail, Inc., a Florida Corporation; Ward Castenada, Inc., a Florida Corporation; Harry's of Orange Park, Inc., a Florida Corporation; Varsity Club, Inc., a Florida Corporation; Flynn Restaurants, Ltd., an Iowa Corporation, 57 Heaven, a Corporation; and Printer Enterprises, Inc., a Florida Corporation,

Appellants,

V.

Clay County, a Political Subdivision of the State of Florida, and Scott Lancaster, as Sheriff of Clay County,

Appellees.

_____/

Opinion filed November 22, 1994.

BENTON, J.

We are asked to declare unconstitutional on its face a county ordinance outlawing the sale of alcohol on "Christmas day and Christmas night." Appellants contend that the ordinance violates constitutional

prohibitions against the establishment of religion.[1] We conclude that Christmas, notwithstanding its deep religious significance for many, also has secular traditions which local government is free to acknowledge, without offending the constitutions either of Florida or of the United States. We affirm the order denying plaintiffs' motion for temporary injunction, and uphold the ordinance.

Procedural History

Alleging themselves licensed to sell alcoholic beverages in unincorporated Clay County, appellants filed in the circuit court

[1] The first amendment to the United States Constitution, made applicable to the States by the Fourteenth, Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 2d 711 (1946), provides that "Congress shall make no law respecting an establishment of religion ..." Article I, section 3 of the Florida Constitution provides:

> There shall be no law respecting the establishment of religion .... No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.

seeking an injunction against the enforcement of Section 3-2(c), Clay County Code, on grounds that the ordinance "in effect, force[s] the observance of a religious holiday by liquor licensees[,] ... violates the [E]stablishment [C]lause ... and ... Article I, Section 3, of the Florida Constitution ...[,] advances religion in general, and particularly the Christian religion ... and ... results in entanglement between religion and state."

With exemplary alacrity fully appropriate to the importance of the Constitutional questions raised, the trial court scheduled a hearing for December 21, 1993, on appellants' verified motion for temporary injunction, which was filed along with the complaint on December 17, 1993.

At the hearing for the first time, as a separate basis for relief, appellants urged the County has no authority to regulate the days on which purveyors of alcoholic beverages may open for business, on account

of Section 562.14, Florida Statutes (1993). Even though this contention had not been set out in the complaint or in the verified motion for temporary injunction, the trial court's comprehensive order denying plaintiffs' motion for temporary injunction, entered the day after the hearing, reached the merits of appellants' belated statutory argument, ruling that the statute did not preclude the challenged ordinance.

An earlier effort to obtain review of the order denying plaintiffs' motion for temporary injunction on an emergency basis proved unavailing. In an unreported order entered on December 23, 1993, another panel of this court denied appellants' emergency petition for writ of mandamus or, alternatively, for order reversing the lower court's denial of motion for temporary restraining order or, alternatively, for an order granting petitioner's temporary restraining order "without prejudice to the right of petitioners/appellants to pursue

their appellate remedies in this case in accordance with Florida Rule of Appellate Procedure 9.130."

Decision Sought

We now have for review the order denying plaintiffs' motion for temporary injunction. Fla. R. App. P. 9.130(a)(3)(B). In that ostensibly preliminary order, the trial court addressed the questions which must be resolved to decide the merits of the controversy. Consideration of the merits in this context was necessary because temporary injunctions should not

> be entered in the absence of a substantial likelihood that the party seeking the injunction is entitled to relief on the merits. Such a likelihood is required under Florida law.... It is not enough that a merely colorable claim is advanced.
>
> Prior to issuing a temporary injunction, a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested. See, e.g., Oxford International Bank and Trust, Ltd. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 374 So. 2d 54 (Fla. 3rd DCA 1979), cert. dismissed, 383 So. 2d 1199 (Fla. 1980).

Mid-Florida at Eustis, Inc. v. Griffen, 521 So. 2d 357 (1988).

City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So. 2d 750, 753 (Fla. 1st DCA 1994), review granted, Naegele Outdoor Advertising Co., Inc. v. City of Jacksonville, (Fla., Sep 06, 1994) (Table, No. 83,734). It is one thing to consider the merits, and another to decide them. The grant or denial of a temporary injunction does not ordinarily

> decide the merits of the case unless (1) the hearing is specially set for that purpose, [and] (2) the parties have had a full opportunity to present their cases, University of Texas v. Camenisch, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981), and a denial of a preliminary injunction or reversal of an order granting same does not preclude the granting of a permanent injunction at the conclusion of a full hearing. Hialeah, Inc. v. B & G Horse Transportation, Inc., 368 So. 2d 930 (Fla. 3d DCA 1979).

Ladner v. Plaza Del Prado Condominium Ass'n, Inc., 423 So. 2d 927, 929 (Fla. 3d DCA 1982). At oral argument in the present case, however, appellate counsel joined in a request that the case be decided on the

present record. Counsel for plaintiffs below specifically waived the right to offer further evidence, in effect conceding that plaintiffs "have had a full opportunity to present their cases." In these circumstances, considerations of judicial economy militate in favor of reaching the merits of the parties' contentions.

Hours of Sale

In keeping with the rule of decision which forbids reaching constitutional questions when cases can be disposed of on statutory grounds, we turn first to plaintiffs' statutory claim. Appellants contend that Florida counties lack authority under the beverage laws to forbid the sale of alcoholic beverages for an entire day, although they concede that Clay County can limit the hours of sale for alcoholic beverages on particular days in unincorporated portions of the county.

This contention flies in the teeth of the controlling statutes. To the extent not

inconsistent with general law, Clay County is authorized to:

> Establish and enforce regulations for the sale of alcoholic beverages in the unincorporated areas of the county pursuant to general law.

§ 125.01(1)(o), Fla. Stat. (1993). Pertinent general law contemplates that courts will set and "be responsible for the enforcement of the hours of sale established by county or municipal ordinance," § 562.14(2), Fla. Stat. (1993), and provides:

> Nothing contained in the Beverage Law shall be construed to affect or impair the power or right of any county or incorporated municipality of the state to enact ordinances regulating the hours of business...of any licensee under the Beverage Law within the county or corporate limits of such municipality.

§562.45(2)(a), Fla. Stat. (1993). In Hardage v. City of Jacksonville Beach, 399 So. 2d 1077 (Fla. 1st DCA 1981), review denied, 411 So. 2d 382, we upheld an "ordinance which bans the sale of alcoholic beverages on Sunday with certain exceptions." Hardage, 399 So. 2d at 1078. None of the exceptions inured to Hardage's benefit. We upheld the

ban there even though that ordinance permitted Sunday sales by certain of Hardage's competitors. But cf. Moore v. Thompson, 126 So. 2d 543 (Fla. 1960).

Our decision in City of Jacksonville v. C.J. Ventures, Inc., 558 So. 2d 133 (Fla. 1st DCA 1990) stands for the unremarkable proposition that enforcement of an ordinance (whatever the subject matter) is properly enjoined where "the ordinance in question violates the due process provisions of the Fifth Amendment of the Constitution of the United States, " C.J. Ventures, 558 So. 2d at 135, because "it provides for no standards or criteria upon which the Sheriff is to make," id., decisions as to who is in compliance.

Florida Constitutional Rights

"When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." Traylor v. State,

596 So. 2d 957, 962 (Fla. 1992) (footnote omitted). "To be held constitutional, the instant [ordinance] must pass muster under both the federal and state constitutions." In re T.W., 551 So. 2d 1186, 1190 (Fla. 1989).

Appellants contend that "the Florida Supreme Court appears to have held that any statute premised upon the requirement that a business closed on Sunday, Christmas, or any other religious days is unconstitutional as abridging the separation of Church and State Doctrine." Initial Brief, at 17. We do not read the decision in Moore v. Thompson, 126 So. 2d 543 (Fla. 1960), on which appellants rely,[2] for such a broad proposition. At issue in Moore was the validity of a statute forbidding motor vehicle dealers to do business on Sundays or legal holidays, including Christmas.

Although Justice Drew's opinion for the

[2] Appellants also cite Kelly v. Blackburn, 95 So. 2d 260 (Fla. 1957) and Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952).

court recounts at some length the history of blue laws in Florida, the Moore court's invalidation of a Sunday closing statute, which affected car dealers but no other businesses, rested on notions of equal protection. The opinion quoted from the precedent on which it chiefly relied:

> We reached the conclusion in Henderson that such statutory provisions were unconstitutional, since the distinctions made in them between businesses permitted to operate on Sunday and those which were prohibited from operating were wholly arbitrary and made without a reasonable basis for upholding them as a valid exercise of the police power. We disposed of the Kelly case on the authority of the Henderson case, re-affirming and holding decisive of the question presented the following language in that case:
>
> > It may be said that the closing of all business houses on Sunday, except in cases of emergency, bears a rational and reasonable relationship to the public health, safety, morals or general welfare because thereby protection is afforded all citizens from the evils attendant upon uninterrupted labor. Nevertheless, it does not

follow that laws containing the exemption of many business and vocations, such as the legislative enactments now under consideration, can be said to bear such relationship to the public health, safety, morals or general welfare as to declare them to be valid general laws (although they may be general laws in the sense that they are effective in each and every county of the State) simply because they operate equally upon all within a certain class or classes. It is necessary that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all. State ex rel. Pennington v. Quigg, 94 Fla. 1056, 114 So. 859; Mayo v. Polk Co., 124 Fla. 534, 169 So. 41, appeal dismissed Polk Co. v. Mayo, 299 U.S. 507, 57 S. Ct. 39, 81 L. Ed. 376; Crandon v. Hazlett, 157 Fla. 574, 26 So. 2d 638; Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664; City of Denver v. Bach, 26 Colo. 530, 58 P. 1089, 46 L.R.A. 848.

It is not suggested that the parties who work on used car lots need

protection from being cajoled into uninterrupted labor more than do citizens who are engaged in any of the exempt businesses or vocations. We can think of no reason, and none has been suggested to us, why the health, safety, morals or general welfare of our citizens would be safeguarded to any greater degree by requiring used car dealers to close their places of business on Sunday than such rights or guaranties would be safeguarded were such persons allowed to do business on the Sabbath along with proprietors of tourist attractions. Nor is it clear to us that any reasonable basis exists for exempting parking lots and filling stations from the operation of these so-called 'Sunday Closing Laws' and not exempting garages. Such distinctions appear to be nebulous, wholly arbitrary and are made without a reasonable basis for upholding them as a valid exercise of the police power. Indeed, each of these distinctions fits into the category of a "distinction without a difference."

Moore, 126 So. 2d at 546-47 (emphasis in original). In invalidating the statute in Moore, just as it had invalidated two predecessor statutes seeking to accomplish the same end, the Supreme Court said:

> We hold the "valid and substantial reason" [62 So. 2d 9] yardstick has not been met which would allow the Legislature to make such a law operate only upon this certain class of business, rather than generally upon all.

Moore, at 551. Subsequent case law has confirmed the essentially "equal protection" basis for the court's decision in Moore. E.g., Rollins v. State, 354 So. 2d 61, 63 (Fla. 1978).

Appellants' attack on Clay County's ordinance, predicated on the line of cases culminating in Moore, boils down, therefore, to an assertion that there is no "valid and substantial reason" for regulating the hours of sale of alcoholic beverages, when no other enterprise is so restricted. But this type of discrimination against purveyors of alcoholic beverages is the rule rather than

the exception. No case of which we are aware has held that an ordinance "violates the state and federal guarantees of equal protection of the laws," Shevin v. Bocaccio, Inc., 379 So. 2d 105, 106 (Fla. 1979), because it "applies only to alcoholic beverage licensees and their employees." Id.

> The dictates of due process and equal protection, related in regulation of this type, require only that the statutory means of regulation be rationally related to the statutory objective, and that the members of the regulated class be treated equally. Soverino v. State, 356 So. 2d 269 (Fla. 1978); Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976).

Id. Clay County's "power to regulate conditions in licensed premises is derived from [the state's] power to totally prohibit sales [of alcoholic beverages.]" City of Daytona Beach v. del Percio, 476 So. 2d 197, 201 (Fla. 1985). "The Florida Constitution and the statutes...imbue the C[oun]ty with the state's full police powers, including those under the twenty-first amendment." Id.

Religious Establishment Claimed

Under both the Florida and federal constitutions, appellants raise the question whether banning the sale of alcoholic beverages on Christmas amounts to a tacit endorsement or establishment of Christianity as an official religion. With the exception of Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983) and Larson v. Valente, 456 U.S. 228, 72 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983), the United States Supreme Court has, since their formulation, applied the three tests articulated in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971). These three issues must also be addressed in deciding the Florida constitutional question. To these tests, moreover, Article I, Section 3 of the Florida Constitution adds a fourth: The statute must not authorize the use of public moneys, directly or indirectly, in aid of any sectarian institution. Any statute that passes muster under article I, section 3 of the Florida Constitution necessarily meets

the federal Establishment Clause tests.

Governmental support of religion need not be monetary to offend article I, section 3 of the Florida Constitution. No less than its federal counterpart, the Florida provision "was intended to protect against sponsorship...and active involvement of the sovereign in religious activity." Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697 (1970). Predecessor provisions[3] were the basis for decision in

---

[3] At the time of the Brown decision, Florida's "establishment clause" provided:

> No preference shall be given by law to any church, sect or mode of worship and no money

shall ever be taken from the treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution.
Art. 1, § 5, Fla. Const. (1885). The "free exercise clause" appeared separately:

> The free exercise and enjoyment of religious profession and worship shall for-ever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to justify

licentiousness or practices subversive of, or inconsistent with, the peace or moral safety of the State or society.

Originally, as now, both ideas had appeared in a single provision of the Declaration of Rights, article 1, section 3 of the Florida Constitution of 1838:

> That the great and essential principles of liberty and free government may be recognized and established, we declare:
>
> ...
>
> 3. That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience; and that no preference shall ever be given by law, to any religious establishment, or mode of worship in this State.

The same unified, theistic formulation appeared in the Florida Constitution of 1865. The Constitution of 1868 initiated the separate treatment of free exercise and establishment that persisted in the Constitution of 1885:

> 4. The free exercise and enjoyment of religious profession and worship shall forever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of the peace and safety of the State.
>
> 23. No preference can be given by law to any church, sect, or mode of worship.

Declaration of Rights, §§ 4, 23, Fla. Const. (1868).

Brown v. Orange County Board of Public Instruction, 128 So. 2d 181 (Fla. 2d DCA 1960), in which the court held that the

> distribution of Gideon Bibles through the school system each year certainly approximates an annual promotion and endorsement of the religious sects or groups which follow its teachings and precepts. This distribution likewise would tend to impair the rights of plaintiffs and their children to be free from governmental action which discriminates in the free exercise of religious belief.

Brown, 128 So. 2d at 185. Even in the absence of the expenditure of public moneys, the Florida Constitution proscribes governmental "endorsement" of religious groups, partly on the theory that such official sanction may interfere with other groups' free exercise of religion.[4]

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what

---

[4] There is no distinct claim here, however, that the challenged ordinance has the purpose or effect of impeding appellants' free exercise of religion.

shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). Our constitutions, state and federal, reflect the view that a "union of government and religion tends to destroy government and degrade religion." Engel v. Vitale, 370 U.S. 421, 431, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). In nearly identical language, the Florida and federal constitutions each proscribe laws respecting any official establishment of religion.

Because the challenged ordinance has no explicit statement of purpose, we are left to infer its purposes. One apparent purpose is to encourage a respite from work, making family activity on Christmas Day possible. To that extent, McGowan v. Maryland, 366 U.S. 420, 452, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), fully answers the contention that

Christmas' historical religious significance renders the ordinance unconstitutional. "People of all religions and people with no religion regard [Christmas no less than] Sunday as a time for family activity, for visiting friends and relatives,...and the like." McGowan, 366 U.S. at 452. "To say that the States cannot prescribe [Christmas as well as] Sunday as a day of rest for these purposes solely because centuries ago [or even more recently] such laws had their genesis in religion would give a constitutional interpretation of hostility to religion rather than one of mere separation of church and state." McGowan, 366 U.S. at 445.

Along with the putative purpose to encourage purveyors of alcohol to rest from their labors on Christmas, in order to spend time with their families, the ordinance evinces another apparent purpose: To discourage consumption of alcohol on Christmas. Neither of these seeming

purposes[5] run afoul of the state and federal constitutional prohibitions against governmental establishment of religion. If the primary or "actual" purpose of Clay County's ordinance is to commemorate or set apart Christmas as a religious holy day, the ordinance must fall. But "[t]his does not mean that the law's purpose must be unrelated to religion, "Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 335, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987), in the sense of ignoring that friends and families may prove accessible because they refrain from work on Christmas, albeit for religious reasons. Plaintiffs failed to establish at the hearing that some prohibited purpose motivated adoption of the ordinance, and we are unwilling to presume any unconstitutional motive.

[5] It is true, of course, that the ordinance mandates neither rest nor abstinence. Vendors of alcoholic beverages are free to sell food or other wares on Christmas, or to take stock of inventory. Clay Countians intent on imbibing eggnog on Christmas Day can acquire bourbon or rum ahead of time.

We recognize that abstinence from alcohol is a religious tenet for some. See Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed 2d 297 (1982). On the other hand, sacramental wine is an essential part of Christmas observance in certain Christian traditions, observance which this ordinance could conceivably make more difficult. In any event, we are unable to discern any religious principle that the ordinance under challenge endorses. We are aware of no religious sect that advocates nor any religious teaching to the effect that alcohol should be consumed or be readily available on every day of the year other than Christmas.

Whatever its purposes, no ordinance can pass constitutional muster if its principal or primary effect is to advance religion. We find no such effect here. This ordinance authorizes no expenditure in aid of any institution, sectarian or otherwise. The ordinance does nothing to entangle government

with religion in a constitutionally impermissible way.

> The entanglement which is forbidden is comprehensive, discriminating and continuing state surveillance, Lynch, 465 U.S. at 684, 104 s. Ct. at 1365, 79 L. Ed. 2d at 617; day-to-day surveillance or administration of religious activities, Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 252-53, 110 S. Ct. 2356, 2373, 110 L. Ed. 2d 191, 217 (1990); and programs whose very nature are apt to entangle the state in the details of administration, Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112, 19 L. Ed. 2d at 757.

Todd v. State, __ So. 2d ___, ___ (Fla. 1st DCA 1994), 19 FLW D1804, Aug. 22, 1994. Nothing of the kind is involved here. In forbidding the sale of alcohol on Christmas Day and Christmas night, Clay County's ordinance does not, as a matter of Florida constitutional law, show "favoritism...towards citizens based on their personal religious choices...[nor] endorse the religious practices and beliefs of some citizens." County of Allegheny v. American Civil Liberties Union Greater Pittsburgh

Chapter, 492 U.S. 573, 627, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (O'Connor, J., concurring).

The Supreme Court of Connecticut found certain Connecticut statutes "unconstitutional in that they prohibit the sale of alcoholic beverages on Good Friday, in violation of...the first and fourteenth amendments to the United States Constitution." Griswold v. State, 183 Conn. 552, 558, 441 A.2d 16 (1981). But see Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) (declaring Good Friday a state holiday does not offend the Establishment Clause). While we have no quarrel with the conclusions reached by the Griswold court (and the dissent in Cammack), whether as a matter of federal or of Florida constitutional law, we conclude that, unlike Good Friday, Christmas enjoys a special constitutional status by virtue of the secular traditions associated with it. The same is true of Thanksgiving, and even of Halloween. See Guyer v. School

Bd. of Alachua County, 634 So. 2d 806 (Fla. 1st DCA 1994).

Section 3-2(c), Clay County Code, does not offend Article I, Section 3 of the Florida Constitution, nor, a fortiori, the Establishment Clause of the First Amendment to the United States Constitution. The proposition that any law that recognizes or sets apart Christmas in any way amounts to an unconstitutional, official expression of approval of Christianity is not tenable. County of Allegheny; Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). No less an authority than Justice Brennan tells us that "public designation of Christmas Day as a holiday is constitutionally acceptable," Lynch, 465 U.S. at 710, because "the Christmas holiday in our national culture contains both secular and sectarian elements." Id. (Brennan, J., dissenting) (footnote omitted).

AFFIRMED.

ZEHMER, C.J., and KAHN, JR., CONCUR.

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 12, 1995

CASE NO. 84, 875

District Court
1st District - No. 93-4154

SILVER ROSE ENTERTAINMENT, INC., etc., et al.,

Petitioners,

v.

CLAY COUNTY, etc., et al.,

Respondents.

* * * * * * * * * * * * * * *

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN and HARDING, JJ., concur
ANSTEAD, J., dissents

BHP
cc: Hon. Jon S. Wheeler, Clerk
Hon. John Keene, Clerk
Hon. William A. Wilkes,Judge

Stephen C. Bullock
Edward K. Cottrell
Alan K. Ragan
Frances J. Moss
Mark H. Scruby
John Kopelousos

A True Copy

TEST

By:
Deputy Clerk
Sid J. White
Clerk, Supreme Court